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IN THE

Supreme Court of the United States

No. 874

EDWARD JOSEPH POGOR and
MIGUEL QUINONES,

Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

BERNARD TOMPKINS AND VICTOR J. HERWITZ,
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IN THE

Supreme Court of the United States

..... TERM, 1958

No. .....

EDWARD JOSEPH POGOR and MIGUEL QUINONES,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

There were no opinions in any of the courts below.

Jurisdiction

The appellants were originally proceeded against by an information filed in the Court of Special Sessions of the City of New York, New York County, on January 5, 1956 pursuant to Section 742 of the Code of Criminal Procedure

which charged appellants in two counts with the crime of conspiracy to commit acts for the obstruction and perversion of justice and of the due administration of the laws in violation of Penal Law, Section 580, subdivision 6 and the crime of suppressing evidence in violation of Penal Law, Section 814.

This appeal is from an order of the Court of Appeals of the State of New York entered October 17, 1957, and filed in the Court of Special Sessions on October 31, 1957, which denied re-argument of an order of said court entered July 3, 1957 which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which affirmed judgments of the Court of Special Sessions of the City of New York, New York County, entered June 28, 1956, convicting the appellant Quinones of the crime of conspiracy and sentencing him to serve sixty (60) days in the Workhouse and convicting the appellant Pogor of the crime of conspiracy and the crime of suppressing evidence and sentencing him to serve sixty (60) days in the Workhouse on each count, to run concurrently.

The notice of appeal herein was filed in the Court of Special Sessions of the City of New York, New York County, on January 22, 1958.

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1257 subdivisions 2 and 3.

Cases sustaining the Court's jurisdiction are:

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67;

Oxley Stove Co. v. *Butler County*, 166 U. S. 648, 655.

Statute Involved

Involved on this appeal is New York Penal Law, Section 580, subdivision 6, which insofar as is pertinent here reads as follows:

"DEFINITION AND PUNISHMENT OF CONSPIRACY

"If two or more persons conspire:

* * *

"6. To commit any act * * * for the perversion or obstruction of justice, or of the due administration of the laws,

"Each of them is guilty of a misdemeanor."

The questions presented were defined by the Court of Appeals in its order of October 17, 1957 granting appellants motion to amend the remittitur to read as follows:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: the defendants argued that subdivision 6 of Section 580 of the Penal Law is so vague and indefinite that it fails adequately to define the offense or to provide reasonable standards for determining guilt and that the information and the bill of particulars failed adequately to apprise them of the nature of the charges against them, all in violation of the Fourteenth Amendment. This Court held that there were no violations of any constitutional right of said defendants."

Statement

Penal Law, Section 580, whose constitutionality is here questioned, is set forth in its entirety in Appendix "B". The portion of that statute here involved was quoted above and will not be repeated for that reason. Its validity under the due process clause of the Fourteenth Amendment was raised and argued by the appellants in the Court of Appeals.

By motion in arrest of judgment before sentence was pronounced in the Court of Special Sessions, and in their appeals to the Appellate Division and to the Court of

Appeals, the appellants maintained that the information and the bill of particulars failed adequately to apprise them of the nature of the charges against them and thus deprived them of a fair trial in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

The information, the particulars sought and the bill of particulars obtained are set forth below:

The Information

The first count of the information accused the appellants:

"• • • of the crime of conspiracy committed as follows:

"The said defendants, between on or about January 10, 1955, and on or about November 30, 1955, in the County of New York, unlawfully did corruptly conspire together and with divers other persons to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

AND, the said defendants together with divers other persons, in the County of New York and at divers other places in pursuance and furtherance of the said conspiracy and to effect the objects thereof, committed the following overt acts:

1. The said defendants, on or about January 28, 1955 had a conversation with one Jose Rosario, on the Steamship United States.

2. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of Kings, took and received a certain writing and paper from one Frederick Biester.

3. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of New York, concealed the said writing and paper which he had taken and received from the said Frederick Biester."

By the second count of the information the appellants were accused of:

"• • • the crime of suppressing evidence, committed as follows:

"The said defendants, in and about the month of November, 1955, in the County of New York, unlawfully did maliciously practice deceit and fraud, with intent to prevent one Frederick Biester, who had in his possession a certain writing and paper which might be evidence in a certain proceeding entitled The People of the States of New York against John T. Hunt, being cognizant of any fact material thereto from producing and disclosing the same."

Particulars Sought

The appellants made a motion before trial for a bill of particulars in which they sought the following information:

1. The exact time and place where the defendants first allegedly conspired as mentioned in Count 1 of the information herein.

2. The names of the divers other persons with whom the defendants allegedly conspired, as mentioned in Count 1 of the information.

3. The nature and character of the evidence which the defendants conspired to suppress, as mentioned in Count 1 of the information.

4. The nature and character of the acts for the perversion and obstruction of justice, and of the due administration of the laws, which the defendants allegedly conspired to commit, as mentioned in Count 1 of the information.

5. The nature and character of the deceit and fraud which the defendants allegedly practiced as mentioned in Count 2 of the information.

6. The meaning or significance of the words mentioned in Count 2 of the information, "being cognizant of any fact material thereto," and state who was or was not cognizant of what fact.

7. Upon whom the defendants practiced the alleged deceit and fraud;

and for such other and further relief as to the Court may seem just and proper.

Particulars Supplied

The appellants motion was denied as to all items of particulars sought except item 3 as to which the District Attorney supplied the following particulars:

> "The nature and character of the evidence which the defendants conspired to suppress was a certain writing and paper signed 'John Hunt' authorizing Frederick Biester to see John T. Hunt."

The Questions Presented Are Substantial

It is perfectly apparent that the information herein did not adequately apprise the appellants of the nature of the charges made against them. The conspiracy count merely characterized the acts which the appellants allegedly conspired to commit. But characterization was hardly suffi-

cient to convey to the appellants information which they had to have in order to enable them to prepare their defense and be protected against being tried again for the same offense.

The suppressing evidence count was also deficient in the essential factual elements of the crime charged. The appellants were accused of practicing fraud and deceit, and that was the gravamen of the offense charged, yet the appellants have never been informed of what their claimed fraud consisted. Without such information, they could not prepare to defend themselves nor could they be protected from being twice tried for the same offense.

As shown above the bill of particulars supplied by the District Attorney added little to the information contained in the information itself. Certainly the bill of particulars did not make up for the glaring deficiencies in the information. The appellants were required to go to trial without any statement whatsoever, either in the information or the bill of particulars, as to what acts they allegedly conspired to commit, or in what respect or how such acts tended to pervert and obstruct justice and the due administration of the laws.

As to the second count of the information, the appellants moved for a bill of particulars which would require the District Attorney to state: "The nature and character of the deceit and fraud which the defendants allegedly practiced" but their request was denied. They were thus not permitted to know the most fundamental facts necessary to understand the charge made against them.

I

In interpreting the constitutional right of an accused in a criminal action "to be informed of the nature and cause of the accusation", this Court has enunciated the

fundamental principle that the constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. *United States* v. *Cruikshank*, 92 U. S. 542, 544, 558; *United States* v. *Simmons*, 96 U. S. 360; *Bartell* v. *United States*, 227 U. S. 427; *Burton* v. *United States*, 202 U. S. 344.

No indictment is sufficient if it does not allege all of the ingredients which constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology. *Potter* v. *United States*, 155 U. S. 438, 444; but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute; the facts necessary to bring the case within the statutory definition must also be alleged. *United States* v. *Caril*, 105 U. S. 611.

A leading case in this Court with reference to the contents of an indictment is *Pettibone* v. *United States*, 148 U. S. 197, wherein the Court said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. (United States v. Hess, 124 U. S. 483, 486.) * * *."

A recent case in this Court, *United States* v. *Debrow*, 346 U. S. 374, 376, quoted with approval *Hagnar* v. *United*

States, 285 U. S. 427, 431, in which the test of an indictment was stated as follows:

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

The 14th Amendment of the Constitution of the United States provides in part as follows:

> "• • • nor shall any State deprive any person of life, liberty or property, without due process of law; • • •"

"Due process", this Court has held, "requires that the proceedings shall be fair • • •." *Snyder* v. *United States*, 291 U. S. 97.

"As applied to a criminal trial" this Court has held that "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U. S. 219, 236.

Basic to the very idea of free government and among the immutable principles of justice which no State of the Union may disregard is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." *Powell* v. *United States*, 287 U. S. 45, 68.

As to the requirements of an indictment charging conspiracy the rule was clearly stated in *Pettibone* v. *United States*, *supra*, at page 203:

> "• • • when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to

compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

It is submitted that in the light of these authorities, basic rights of the appellants, guaranteed to them under the Fourteenth Amendment, were violated. A mere reading of the information herewith makes it clear that it contains no statement whatsoever of the acts constituting the offense charged or of the means used. Only legal conclusions are pleaded and no facts from which such conclusions were drawn are set forth. With respect to Count I there is no specification as to what acts the defendant conspired to commit or in what respect such acts tended to prevent and obstruct justice.

With respect to Count II there is no specification as to what type of "deceit and fraud" was allegedly used by the defendants and, as has been stated, this information was denied to the defendants when they asked for it on their demand for a bill of particulars.

Clearly then in the light of the above stated cases, the information herein is fatally defective and this conviction should be reversed because the constitutional right of the defendants to notice of the charge against them was violated.

II

It is fundamental that a criminal statute must lay down an ascertainable standard of conduct. *Winters* v. *New York*, 333 U. S. 507. It is the contention of the appellants that section 580 (6) of the New York State Penal Law under which they were convicted is so vague and indefinite that it violates this principle.

The case of *Musser* v. *United States*, 333 U. S. 95, in which this Court sent back to the Utah State Supreme Court a criminal statute almost identical in wording with the statute involved in the case at bar to consider the question of whether that statute violated the rights of the defendant, is squarely in point.

In the case at bar the New York State Court of Appeals held that section 580 (6) of the Penal Law was not violative of the rights of the defendant and it is that question which is raised upon this appeal.

The only crimes in New York are those defined by the Penal Law. The phrase "Acts for the perversion and obstruction of justice and of the due administration of the laws" as used in section 580 (6) of the Penal Law are clearly meaningless to the layman. They are vague and indefinite and nowhere defined. Therefore the statute under which the defendants were convicted lays down no ascertainable standard of conduct. Under these circumstances the convictions herein should be reversed.

Conclusion

Because the information under which the defendants were convicted, violated their rights under the 14th Amendment to the United States Constitution, and because the statute under which the defendants were convicted is vague and indefinite on its face, their conviction should be reversed herein.

Respectfully submitted,

Bernard Tompkins & Victor J. Herwitz,
Attorneys for the Appellants,
Office & P. O. Address,
165 Broadway,
New York 6, N. Y.

February 4, 1958

Appendix A

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of October A. D. 1957.

Present, HON. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 365

THE PEOPLE &c.,

Respondent,

vs.

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Appellants.

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix A

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: the defendants argued that subdivision 6 of section 580 of the Penal Law is so vague and indefinite that it fails adequately to define the offense or to provide reasonable standards for determining guilt and that the information and the bill of particulars failed adequately to apprise them of the nature of the charges against them, all in violation of the Fourteenth Amendment. This Court held that there was no violation of any constitutional right of said defendants.

And the Court of Special Sessions of the City of New York is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Geason Kimball,
Deputy Clerk.

Appendix B

Section 580 of The Penal Law of the States of New York, as of the date of the information herein, read as follows:

"If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceeding; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor."

Appendix B

Section 814 of the Penal Law of the State of New York states as follows:

> "A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper, or other thing which might be evidence, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper, or other thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor."

Appendix C

Notice of Appeal to the Supreme Court of the United States.

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Appellants,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

I. Notice is hereby given that Edward Joseph Pogor and Miguel Quinones, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered herein on the 22nd day of October, 1957 denying appellant's motion for reargument and affirming an order of the Appellate Division of the Supreme Court, First Department which in turn affirmed judgments of the Court of Special Sessions of the City of New York, County of New York, entered on June 28th, 1956 convicting the appellants of the crime of Conspiracy "to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws" (Penal Law Section 580 Subdivisions 1 and 6) and convicting the appellant Pogor of the crime of Suppressing Evidence (Penal Law Section 814) and sentencing the appellant Quinones to

serve sixty (60) days in the Workhouse and the appellant Pogor to serve sixty (60) days in the Workhouse on each count to run concurrently. The appellants presently are at large on bail in the amount of two thousand five hundred ($2500) dollars each.

This appeal is taken pursuant to 28 U.S.C. Section 1257 Subdivision 2 and 3.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States and include in said transcript the following:

(a) Order of Court of General Sessions Directing Information to be Filed (10-15)*

(b) Information (16-21)

(c) Endorsements on information (22-36)

(d) Demand for Bill of Particulars (13-14)

(e) Affidavit of Victor J. Herwitz (in support of motion for Bill of Particulars 43-54)

(f) Bill of Particulars (55-57)

(g) Colloquy (62-68)

(h) Extract of Clerk's Minutes on Sentence (58-60)

* Numerals in parenthesis refer to folios in the printed record in the Court of Appeals.

III. The following questions are presented on this appeal:

a. Section 580 subdivision 6 of the Penal Law of the State of New York (for violation of which both appellants have been convicted) provides in part as follows:

"If two or more persons conspire: • • • 6. To commit any act • • • for the perversion or obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor."

The question is whether the above quoted provisions of the said statute are so vague and indefinite as to fail adequately to define the offense or to provide reasonable standards for determining guilt and thus violate the Fourteenth Amendment of the Constitution of the United States insofar as it forbids "any state (to) deprive any person of • • • liberty, without due process of law."

b. The Information and bill of particulars charged as follows:

INFORMATION

"BE IT REMEMBERED that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendants of the Crime of Conspiracy, committed as follows:

The said defendants, between on or about January 10, 1955, and on or about November 30, 1955, in the County of New York, unlawfully did corruptly conspire together and with divers other persons to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

AND, the said defendants, together with divers other persons, in the County of New York and at divers other places in pursuance and furtherance of the said conspiracy and to effect the objects thereof, committed the following overt acts:

Appendix C

1. The said defendants, on or about January 28, 1955 had a conversation with one Jose Rosario, on the Steamship United States.

2. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of Kings, took and received a certain writing and paper from one Frederick Biester.

3. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of New York, concealed the said writing and paper which he had taken and received from the said Frederick Biester.

SECOND COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendants of the Crime of Suppressing Evidence, committed as follows:

The said defendants, in and about the month of November, 1955, in the County of New York, unlawfully did maliciously practice deceit and fraud, with intent to prevent one Frederick Biester, who had in his possession a certain writing and paper which might be evidence in a certain proceeding entitled The People of the State of New York against John T. Hunt, being cognizant of any fact material thereto from producing and disclosing the same.

FRANK S. HOGAN,
District Attorney"

BILL OF PARTICULARS

"The People of the State of New York, in the above-entitled action furnish the following as a Bill of Particulars:

Appendix C

The nature and character of the evidence which the defendants conspired to supppress was a certain writing and paper signed 'John Hunt' authorizing Frederick Biester to see John T. Hunt.

FRANK S. HOGAN
District Attorney,
New York County.

Dated: January 27, 1956"

The question is whether the said information and bill of particulars failed adequately to apprise the appellants of the nature of the charges against them and thus violated the "due process" provisions of the Fourteenth Amendment of the Constitution of the United States.

BERNARD TOMPKINS &
VICTOR J. HERWITZ,
Attorneys for
Pogor & Quinones, Appellants,
Office P. O. Address,
165 Broadway,
Borough of Manhattan,
City of New York.

January 21, 1958.

Appendix D

Information.

Filed 1/5/56

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

against

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Defendants.

BE IT REMEMBERED that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendants of the Crime of Conspiracy, committed as follows:

The said defendants, between on or about January 10, 1955, and on or about November 30, 1955, in the County of New York, unlawfully did corruptly conspire together and with divers other persons to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

AND, the said defendants, together with divers other persons, in the County of New York and at divers other places in pursuance and furtherance of the said conspiracy and to effect the objects thereof, committed the following overt acts:

Appendix D

1. The said defendants, on or about January 28, 1955 had a conversation with one Jose Rosario, on the Steamship United States.

2. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of Kings, took and received a certain writing and paper from one Frederick Biester.

3. The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of New York, concealed the said writing and paper which he had taken and received from the said Frederick Biester.

SECOND COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendants of the Crime of Supressing Evidence, committed as follows:

The said defendants, in and about the month of November, 1955, in the County of New York, unlawfully did maliciously practice deceit and fraud, with intent to prevent one Frederick Biester, who had in his possession a certain writing and paper which might be evidence in a certain proceeding entitled The People of the State of New York against John T. Hunt, being cognizant of any fact material thereto from producing and disclosing the same.

FRANK S. HOGAN,
District Attorney.

Appendix E

Demand for Bill of Particulars.

COURT OF SPECIAL SESSIONS, CITY OF NEW YORK,

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

against

EDWARD JOSEPH POGOR and MIGUEL QUINONES

SIRS:

Please Take Notice that upon the annexed affidavit of Victor J. Herwitz, duly sworn to the 16th day of January 1956, and upon the information filed herein, copy of which is attached hereto and made a part hereof, and upon all the papers and proceedings heretofore filed and had herein, a motion will be made at Part I of this Court, to be held at the Criminal Courts Building, 100 Centre Street, City and County of New York, on the 18th day of January 1956, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order requiring the District Attorney of New York County to furnish to the defendants or their counsel, within a time to be fixed in said order, a bill of particulars which shall set forth:

1. The exact time and place where the defendants first allegedly conspired as mentioned in Count 1 of the information herein.

2. The names of the divers other persons with whom the defendants allegedly conspired, as mentioned in Count 1 of the information.

Appendix E

3. The nature and character of the evidence which the defendants conspired to suppress, as mentioned in Count 1 of the information.

4. The nature and character of the acts for the perversion and obstruction of justice, and of the due administration of the laws, which the defendants allegedly conspired to commit, as mentioned in Count 1 of the information.

5. The nature and character of the deceit and fraud which the defendants allegedly practiced as mentioned in Count 2 of the information.

6. The meaning or significance of the words mentioned in Count 2 of the information, "being cognizant of any fact material thereto," and state who was or was not cognizant of what fact.

7. Upon whom the defendants practiced the alleged deceit and fraud;

and for such other and further relief as to this Court may seem just and proper.

Dated, New York, January 16, 1956.

Yours, etc.,

VICTOR J. HERWITZ,
Attorney for Defendants,
165 Broadway,
New York 6, N. Y.

To:

HON. FRANK S. HOGAN,
District Attorney,
New York County.

Appendix F

Bill of Particulars.

COURT OF SPECIAL SESSIONS,

CITY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

against

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Defendants.

The People of the State of New York, in the above-entitled action furnish the following as a Bill of Particulars:

The nature and character of the evidence which the defendants conspired to suppress was a certain writing and paper signed "John Hunt" authorizing Frederick Biester to see John T. Hunt.

FRANK S. HOGAN,
District Attorney,
New York County.

Dated: January 27, 1956.

To:

VICTOR J. HERWITZ, Esq.,
165 Broadway,
New York, New York.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 24 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 874*

EDWARD JOSEPH POGOR and MIGUEL QUINONES,

Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN
District Attorney, New York County
155 Leonard Street
New York 13, N. Y.
Counsel for the Appellee

RICHARD G. DENZER
155 Leonard Street
New York 13, N. Y.

LAWRENCE K. FEITELL
Assistant District Attorneys
Of Counsel

* Number not yet assigned to appellants

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Supreme Court of the United States

October Term, 1957

No. ..... *

EDWARD JOSEPH POGOR and MIGUEL QUINONES,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

May It Please the Court:

Now comes the appellee in the above-entitled cause and moves the appeal be dismissed, and that *certiorari* be denied, or, in the alternative, that the final judgment complained of be affirmed.

Statement

This is an appeal from a final order of the New York Court of Appeals entered on July 3, 1957, unanimously affirming, without opinion [3 N. Y. (2d) 836, rearg. den. 3 N. Y. (2d) 941], an order of the Appellate Division of the Supreme Court, First Department, which affirmed, without

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* Number not yet assigned to appellants.

opinion [3 App. Div. (2d) 703], a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered June 28, 1956, convicting both appellants of the crime of CONSPIRACY (Penal Law, §§580, subds. 1, 6; 814) and the appellant Pogor of the crime of SUPPRESSING EVIDENCE (Penal Law, §814), after a trial. On the conspiracy count, each appellant was sentenced to serve sixty days in the workhouse. On the substantive count for suppression of evidence, the appellant Pogor was sentenced to an additional 60 days in the workhouse, to be served concurrently with his sentence on the conspiracy count.

On October 17, 1957, the New York Court of Appeals amended the remittitur in the instant case to state that, upon the appeal in that court, certain federal constitutional questions were raised and "that there was no violation of any constitutional rights of said defendants" [3 N. Y. (2d) 929, 942; Jurisd. Statement, Appendix A, pp. 12-13]. The appellants' notice of appeal from the affirmance of their convictions in the Court of Appeals was filed in the Court of Special Sessions of the City of New York, County of New York, on January 22, 1958 (Jurisd. Statement, p. 2).

The Facts

In 1954, an information was filed in the Court of Special Sessions of New York City and County against one John T. Hunt, business agent for the National Maritime Union of America (hereafter referred to as the N. M. U. or the union), charging him with crimes of receiving bribes as a labor union representative. The specified bribes were allegedly received from men seeking union membership, and

were asserted to consist of payments made by these men to Hunt or an accomplice in return for Hunt's issuance and delivery to them of union working papers.

During the following year, 1955, while the Hunt information was pending, the instant appellants, Pogor and Quinones, union colleagues of Hunt, engaged in a campaign to sabotage the Hunt prosecution. To that end, they approached a seaman named Rosario, one of the men who had purchased union papers from Hunt, and who had confided this criminal transaction to the district attorney. By misrepresentation, deception and intimidation, they attempted —unsuccessfully, as it turned out—to induce Rosario to recant his incriminating statements and to visit Hunt's lawyer, who would advise him what to say.

In another instance, the appellant Pogor visited a seaman named Biester, who also had purchased union membership from Hunt and had apparently so testified before the grand jury. During his visit, Pogor discovered that Biester had a significant slip of paper bearing Hunt's signature or name, which slip the district attorney had long been anxious to obtain and which Biester intended to turn over to him. Pogor wheedled the slip away from Biester with assertions that it was of no importance, left with it, and, when later interrogated about it by the district attorney, claimed that he had lost it.

These activities in Hunt's behalf resulted in the present information against the appellants. In one count, they were charged with conspiracy to obstruct justice and to suppress evidence in violation of section 814 of the Penal

Law, a statute dealing with witness and evidence tampering; and, in a second count, with a substantive violation of that statute, based upon Pogor's acquisition and concealment of the aforementioned slip of paper.

Both appellants were convicted upon the conspiracy count. Upon the second or substantive count, Pogor was convicted and Quinones was acquitted. Both appellants are presently at liberty, on bail, pending the Court's ruling upon their present application.

New York Statute Involved

So far as here pertinent, New York Penal Law, Section 580, subdivision 6, provides as follows:

"Definition and punishment of conspiracy.

"If two or more persons conspire:

* * *

"6. To commit any act * * * for the perversion or obstruction of justice, or of the due administration of the laws,

"Each of them is guilty of a misdemeanor."

The Information

The information presently under attack accuses the appellants in the following language:

"Be It Remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this Information accuse the above-named defendants of the Crime of Conspiracy, committed as follows:

"The said defendants, between on or about January 10, 1955, and on or about November 30, 1955, in the County of New York, unlawfully did corruptly conspire together and with divers other persons to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

"And, the said defendants, together with divers other persons, in the County of New York and at divers other places in pursuance and furtherance of the said conspiracy and to effect the objects thereof, committed the following overt acts:

"The said defendants, on or about January 28, 1955, had a conversation with one Jose Rosario, on the Steamship United States.

"The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of Kings, took and received a certain writing and paper from one Frederick Biester.

"The said defendant Edward Joseph Pogor, in and about the month of November, 1955, in the County of New York, concealed the said writing and paper which he had taken and received from the said Frederick Biester.

"SECOND COUNT

"AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendants of the Crime of Suppressing Evidence, committed as follows:

"The said defendants, in and about the month of November, 1955, in the County of New York, unlawfully did maliciously practice deceit and fraud, with intent to prevent one Frederick Biester, who had in his possession certain writing and paper which might be evidence in a certain proceeding entitled The People of the State of New York against John T. Hunt, being cognizant of any fact material thereto from producing and disclosing the same.

FRANK S. HOGAN,
District Attorney"

Questions Presented

The issues raised by the appellants in their present application are:

1. Whether Penal Law Section 580, Subdivision 6, is void for vagueness in so far as it proscribes "Acts for the perversion and obstruction of justice and of the due administration of the laws" (Jurisd. Statement, pp. 10-11), and,

2. Whether the information upon which the appellants were charged lacked sufficient specificity to meet the requirements of federal constitutional due process (Jurisd. Statement, pp. 7-10).

POINT I

The appellant's time for taking an appeal and/or for petitioning for review on *certiorari* has expired.

The New York Court of Appeals entered judgment against the appellants on July 3, 1957 [3 N. Y. (2d) 836], and subsequently, on October 17, 1957, amended the remittitur herein to acknowledge the decision of certain federal constitutional questions [3 N. Y. (2d) 929, 941]. Since the appellants did not file a notice of appeal from this judgment with the court "possessed of the record" (The Court of Special Sessions of the City of New York, County of New York) until January 22, 1958 (Jurisd. Statement, p. 2), their present appeal to review is not in time (28 U. S. C., Rev. Rules, Supreme Court of the United States, Rule 11). Having also failed to file their jurisdictional statement, or any other papers which might be treated as a petition for a writ of *certiorari*, with the Clerk of this Court within ninety days after entry of judgment against them in the New York Court of Appeals, the appellants have exhausted the time within which such filing is permitted (*id.*, Rule 22).

POINT II

The statute is specific and definite.

The statute in question (Penal Law, §580, subd. 6) uses words of common, clear, and long-standing import to define the conduct penalized, and is not "clearly meaningless to the layman," as contended by the appellants (Jurisd. Statement, p. 11). So far as it relates to the instant case, the law provides simply and clearly that

> "If two or more persons conspire * * * to commit any act * * * for the perversion or obstruction of justice, or of the due administration of the laws,"

each of them is guilty of a misdemeanor.

The portion of the statute now under attack is no more than the conspiratorial analogue of substantive crimes concerned with witness tampering and suppression of evidence long forbidden by both the English common law and statutes of the State of New York. There is no doubt that both of these sources of law make punishable conduct such as that of the instant appellants who, in attempting to subvert a criminal prosecution pending against one of their union superiors, secreted evidence and intimidated witnesses. [I Burdick, *Law of Crime*, pp. 409 *et seq.*; 8 *Ruling Case Law*, pp. 319 *et seq.*; 67 *Corpus Juris Secundum*, pp. 45, 52-53, 57 *et seq.*; 39 *American Jurisprudence*, pp. 501-506; Wharton, *Criminal Law of the United States* (5th Ed. 1861), §2333; Russell, *Crimes and Misdemeanors* (8th Ed. 1923), pp. 508-509; Penal Law, §§580 (1, 6), 810-814.]

Accordingly, the evidence of clear common law and independent statutory referrents dispositive of the language now under attack is sufficient to sustain its constitutional validity [*Winters* v. *New York* (1947) 333 U. S. 507, 519; *Musser* v. *Utah* (1947) 333 U. S. 95, 97-98; *Champlin Rfg. Co.* v. *Corp. Comm. of Oklahoma* (1932) 286 U. S. 210, 242-243; *Connally* v. *General Construction Co.* (1926) 269 U. S. 385, 391; *People* v. *Grogan* (1932) 260 N. Y. 138, 145-146].

Of course, the primary purpose of the "void for vagueness" doctrine is, to warn individuals of the criminal con-

sequences of their conduct, but this Court has repeatedly ruled that "impossible standards of specificity are not required" [*Jordan* v. *De George* (1951) 341 U. S. 223, 230; *United States* v. *Petrillo* (1947) 332 U. S. 1, 7-8]. Traditionally, no more need be shown than that the statutory language employed conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices [*Connally* v. *General Construction Co.* (1926) 269 U. S. 385, 391]. Strained and technical constructions of a penal statute are to be avoided where their suggestion is manifestly to frustrate the clear purpose of the legislation [*Kordel* v. *United States* (1948) 335 U. S. 345, 348-349], and that the standard employed may be susceptible to doubts in "less obvious" cases does not, of itself, render the proscription unconstitutional for vagueness [*Jordan* v. *De George, supra,* 341 U. S. 223, 233; *Williams* v. *United States* (1951) 341 U. S. 97, 101; *United States* v. *Harris* (1954) 347 U. S. 612, 618; *United States* v. *Petrillo, supra,* 332 U. S. 1, 7; *United States* v. *Ragen* (1942) 314 U. S. 512, 523; *United States* v. *Wurzbach* (1930) 280 U. S. 396, 399; and see *Nash* v. *United States* (1913) 299 U. S. 373, 377].

Nor does anything said or decided in *Musser* v. *United States, supra,* 333 U. S. 95, upon which the appellants heavily rely (Jurisd. Statement, p. 11) effect these conclusions. In that case, the defendants had been convicted under a statute making it criminal to conspire "to commit any acts injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws • • •" (*id.*,

333 U. S., at p. 96). The only portion of this statutory language applied to them in the information was that concerning "public morals," and the offense charged related entirely to the defendants' activities in counselling, advising, and procuring polygamous marriages (*id.*, 333 U. S., at pp. 96-99).

On appeal, this Court deliberately avoided passing upon the constitutionality of the statute, and went no further than to announce that the legislation was "part of the whole body of common and statute law of [Utah] • • • to be judged in that context" (*id.*, at p. 97). Since the Supreme Court of Utah had not specifically set out the margins of the statute's operation or passed upon it from the standpoint of federal due process, the case was remanded to that bench for further consideration.

From this, it is quite apparent that the *Musser* case put into issue statutory language totally different from that involved here. The Utah statute had been applied to a so-called "public morals" situation in such a way as to make the advocacy of certain religious views a crime. Had the Utah statute as applied not been "entwined with limitations on free expression," it seems quite doubtful that any persuasive reason for questioning its clarity would have arisen [*Winters* v. *New York, supra*, 333 U. S. 507, 517, 519]. At all events, it is perfectly apparent that no such "free expression" issue as prevailed in *Musser* was raised, or is implicit, in the instant case. Here, the language to be construed concerns the "perversion or obstruction of justice or of the due administration of the laws" and relates simply to a situation involving

the suppression of evidence and intimidation of witnesses in a criminal case. Since there can be no doubt that the language at issue here has been applied from time immemorial to offences of the very sort charged, and that it does not aim at the creation of new crimes, the appellants' suggestion of vagueness is without foundation [*Beauharnais* v. *Illinois* (1952) 342 U. S. 250, 253; *Winters* v. *New York, supra*, 333 U. S. 507, 519; *Champlin Rfg. Co.* v. *Corp. Comm. of Oklahoma, supra*, 286 U. S. 210, 242-243; *Fox* v. *Washington* (1915) 236 U. S. 273, 277]. In these circumstances, it is apparent that the statutory provision here involved was more than sufficiently clear and did not constitute "a trap for those who act in good faith" [*United States* v. *Ragen* (1942) 314 U. S. 512, 524].

POINT III

The information was sufficient; the court's ruling on the demand for a bill of particulars was proper, and no element of federal due process was denied to the appellants.

A. *Concerning the information*

Under the first count of the information the appellants were charged with conspiring

> "to commit a crime, to wit, to suppress evidence, in violation of Section 814 of the Penal Law, and to commit acts for the perversion and obstruction of justice and the due administration of the laws."

The information next proceeded to list three overt acts from which the existence and operation of the conspiracy

could be proved. The first alleged a conversation had by the appellants with Jose Rosario, on or about January 28, 1955, aboard the Steamship United States. The other two recounted Pogor's acquisition, retention, and concealment of a certain writing from the witness Biester, who had previously appeared before the grand jury in its investigation of John T. Hunt.

The second count charged the appellants with suppressing evidence by fraudulently inducing Biester to relinquish a certain paper material to the development of the People's case against John T. Hunt.

In short, it is clear from the first count that the defendants were charged with conspiracy to commit certain offenses dealing with interference with witnesses and suppression of documentary evidence—subjects covered by section 814 of the Penal Law; that one of these offenses concerned a discussion with Jose Rosario on a specified date on a specified steamship; and that another concerned the taking of a piece of paper by the defendant Pogor from Frederick Biester in a specified month. And the second count, elaborating upon the latter matter, explicitly advised the defendants that the substance of the "suppression" charge was the practice of deceit and fraud by Pogor to obtain this piece of paper, the significance of which was that it promised to play a role in a pending criminal prosecution against John T. Hunt.

The test of the sufficiency of an indictment, this Court has stated [*United States* v. *Debrow* (1953) 346 U. S. 374, 376],

"is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the records show with accuracy to what extent he may plead a former acquittal or conviction. *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34."

The information at hand satisfied each of those requirements by describing the conspiracy in its ultimate effect, and by setting out the means by which the attempt to interfere with the Hunt prosecution had been effected. There is no possibility that the defendants may be subjected to another prosecution for the same offense. Under the first count, they were convicted of a continuing crime committed between January and November 1955, and the judgment fully protects them from a further charge based upon any acts comprising that crime which occurred between those dates. [See *People* v. *Farson* (1927) 244 N. Y. 413, 419; *Wilson* v. *Commonwealth* (1904) 119 Ky. 769, 82 S. W. 427, 428-429.] The judgment against Pogor under the second count of the information is equally conclusive.

Nor can there be any doubt that the information, in charging the offense, the general manner in which it was committed, and the dates between which it occurred, notified the defendants of the nature and character of the crime charged. Quite evidently, therefore, the appellants' contention—in substance, that it was necessary, in order

to enable them to prepare a defense, for the information to recite the numerous evidentiary details relied upon by the People—is baseless.

In these circumstances, it is similarly apparent that their request for a bill of particulars was properly rejected. As an examination of the demand for these particulars (Jurisd. Statement, pp. 5-6) must reveal, each of matters denied went to the very core of the evidence to be offered by the district attorney, and consequently, each was objectionable in the discretion of the court [*Mulloney* v. *United States* (1st Cir. 1935) 79 Fed. (2d) 566, 572; *People* v. *Jordan* (Gen. Sess. N. Y. Co. 1953) 128 N. Y. Supp. (2d) 457, 460; *People* v. *Rubin* (Gen. Sess. N. Y. Co. 1939) 170 Misc. 969, 970-971; *People* v. *Rogers* (Gen. Sess. N. Y. Co. 1934) 150 Misc. 753, 754; and see, *United States* v. *Lepowitch* (1943) 318 U. S. 702; Joyce, *On Indictments* (2d ed. 1924) §325, p. 363].

Finally, that the appellants—as a matter of fact—were in no way confused by the information, is apparent from the record insofar as it demonstrates that they made an acute effort to controvert every element of proof offered by the People and at no point during the trial urged that any testimony elicited by the prosecution had surprised them.

Conclusion

The appellants' contentions are insubstantial and their petition should therefore be dismissed, or in the alternative the judgment complained of should be affirmed.

Respectfully submitted,

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